

United States
1113
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of W. N. RUSSELL, Bankrupt.

THE SCANDINAVIAN AMERICAN BANK
OF BIG TIMBER, MONTANA, a Corpora-
tion,

Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the
Name of W. N. RUSSELL LUMBER COM-
PANY, and W. N. RUSSELL, as an In-
dividual,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain Order
of the United States District Court for the
District of Montana.

Filed

SEP 22 1917

F. D. Monckton,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*United States Circuit Court of Appeals for the
Ninth Circuit.*

THE SCANDINAVIAN AMERICAN BANK OF
BIG TIMBER, a Corporation,

Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the
Name of W. N. RUSSELL LUMBER COM-
PANY, and W. N. RUSSELL as an Indi-
vidual,

Respondent.

In the Matter of W. N. Russell, Bankrupt.

**Petition to U. S. Circuit Court of Appeals for
Revision and Review, etc.**

Petition for Revision and Review in Section 24b of
the Bankruptcy Act of 1898 of the Proceedings of
the United States District Court for the District of
Montana.

Petition for Revision in the United States Circuit
Court of Appeals for the Ninth Circuit, In the Mat-
ter of W. N. Russell, Bankrupt.

Petition of Scandinavian American Bank of Big
Timber, Montana, a corporation to the Circuit Court
of Appeals to review an order in bankruptcy declar-
ing void and fraudulent a certain mortgage made by
the bankrupt to your petitioner.

The petitioner the Scandinavian American Bank
of Big Timber, Montana, a corporation duly organ-
ized and existing under and by virtue of the laws

of the State of Montana, respectfully avers, that it is a creditor of Russell Bankrupt in the amount aggregating four thousand six hundred twenty and 90/100 (\$4620.90) Dollars, that a certain petition in bankruptcy was filed in the District Court of the United States for the District of Montana praying that the said W. N. Russell would be adjudicated a bankrupt, and that thereafter on the 15th day of March, 1916, the said W. N. Russell was in the said District Court duly adjudicated a bankrupt, and the matter of his said bankruptcy was by the Honorable George M. Bourquin, Judge of the District Court, duly referred to the Honorable E. M. Niles, one of the Referees in Bankruptcy of the said District Court, that thereafter the said E. M. Niles as such referee, duly set, fixed and appointed the 3d day of April, 1916, ten A. M., as the time for the first creditors meeting in the matter of the said [1*] bankruptcy of the said W. N. Russell to be held at the office of the said Referee at Livingston, Montana, at which said time and place creditors of the said Russell were to appear, offer for filing their proofs of claims, elect a trustee of the estate of the said bankrupt, W. N. Russell and transact such other business as would properly come before the said meeting. That the said Referee gave due and legal notice to all creditors and the parties interested in the said matter and estate of the said W. N. Russell at the said creditors' meeting.

That on the 3d day of April, 1916, at ten o'clock

*Page-number appearing at foot of page of original certified Petition for Revision.

A. M. creditors of said bankrupt holding a majority of the claims against said bankrupt appeared at the place designated where the first meeting of creditors was to be holden, duly and legally filed their proofs of claims, and at said meeting the above named John G. Ellingson was elected trustee for the benefit of the creditors of said bankrupt; that thereafter, to wit: on the 15th day of May, 1916, your petitioner offered for filing proof of its preferred claim in the form of a chattel mortgage on certain personal property, copy of which proof is hereto attached marked Exhibit "A"; that thereafter objections were filed on the part of the creditors, a copy of which objections is hereto attached marked Exhibit "B"; that thereafter a hearing was had upon the objections and the Referee made the Order, a copy of which is hereto attached marked Exhibit "C".

Your petitioner further alleges: that thereafter and on or about the 29th day of December, 1916, your petitioner filed a petition to review the order of the Referee, a copy of which petition is hereto attached marked Exhibit "D".

Your petitioner further alleges, that on the 12th day of April, 1917, the Honorable George M. Bourquin, Judge of the District Court of the United States in and for the District of Montana, made an Order, a copy of which is hereto attached marked Exhibit "E".

Your petitioner further alleges that the said order is contrary to law and is contrary to the evidence herein in that the evidence shows that the said mort-

gage was made by the parties in good faith, and to secure the amount named therein and that the terms of the said mortgage were substantially complied with and that the evidence is insufficient to justify [2] said order in holding the said mortgage void and fraudulent.

WHEREFORE your petitioner feeling aggrieved because of said order, prays that the same may be reviewed as provided in the Bankruptcy law of 1898.

Dated this 25th day of June, 1917.

CAMPBELL & DORIS,

MILLER, O'CONNOR & MILLER,

Attorneys for Petitioner.

State of Montana,

County of Lewis and Clark,—ss.

James F. O'Connor, being first duly sworn on oath, deposes and says; that he is one of the attorneys for the above-named petitioner; that he makes this verification for and in behalf of the petitioner as such attorney; that the reason he makes this verification is that there is no officer of the petitioner corporation in this County where the petition is being prepared; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

JAMES F. O'CONNOR,

Subscribed and sworn to before me this 25th day of June, 1917.

[Seal]

HELENA C. STILLWAY,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires March 1, 1920. [3]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

THE SCANDINAVIAN AMERICAN BANK OF
BIG TIMBER, a Corporation,
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vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the
Name of W. N. RUSSELL LUMBER COM-
PANY, and W. N. RUSSELL as an Indi-
vidual,

Respondent.

In the Matter of W. N. Russell, Bankrupt.

Assignment of Errors.

The Petitioner in this proceeding in connection with its petition for an Appeal herein hereby makes the following assignment of errors, which it avers occur in this cause.

First. The Court erred in finding the objections made to the allowance of the petitioner's claim as a preferred claim sustained by the evidence.

Second. The Court erred in finding that the parties intended the mortgage to protect them from interference from other creditors and to shield payments to such creditors as the mortgagee preferred and to keep by additions the stock for the protection of the mortgagee.

Third. The Court erred in holding the mortgage in question invalid.

Fourth. The Court erred in affirming the findings

of fact and Order made by the Referee holding the mortgage invalid.

WHEREFORE, the Scandinavian American Bank prays that the said order rendered and entered in the above-entitled cause by the District Court on the 12th day of April, 1917, be reversed.

CHAS. W. CAMPBELL,

MILLER, O'CONNOR & MILLER,

Attorneys for Petitioner. [4]

**Chattel Mortgage, June 29, 1915, Warren N. Russell
to Scandinavian American Bank of Big Timber,
etc.**

CHATTEL MORTGAGE.

THIS MORTGAGE, Made the 29th day of June, in the year 1915, by Warren N. Russell, of Big Timber, in the County of Sweet Grass, State of Montana, mortgagor, to the SCANDINAVIAN AMERICAN BANK OF BIG TIMBER, a banking corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business in the City of Big Timber, Sweet Grass County, Montana, mortgagee:

(Words used in this instrument in the masculine gender include the feminine and neuter, the singular number includes the plural and the plural the singular.)

WITNESSETH: That the said mortgagor mortgages to the mortgagee the following described personal property, situated in the County of Sweet Grass, State of Montana, to wit: All of the stock of coal, lime, cement, paints, oils, lumber and building materials

now contained in the coal sheds on the Northern Pacific Railway Company's Right of Way near Harris Street in the City of Big Timber, Montana, owned and used by the mortgagor herein, and in the lumber yard of said mortgagor situated on Lots NINE (9) and ten (10) in Block No. 16 of the original plat of the townsite of the City of Big Timber. According to the official plat thereof on file in the office of the County Clerk and Recorder of the County of Sweet Grass, State of Montana, to which said map reference is hereby made for further identification of said property, and also the above-mentioned coal sheds,—it being understood and agreed by and between the parties to this mortgage that the party of the first part may and he is hereby authorized to sell from such stock of coal, lime, cement, paints, oils, lumber and building materials, and from other goods of like kind hereafter added thereto, at retail, to the regular and other customers in the usual and general way of business, for cash, or not to exceed thirty days credit to responsible parties, but the party of the first part shall keep accurate account of all such sales and during banking hours of each day deposit the proceeds of such sales in the bank of the mortgagee herein to the credit of the party of the second part to apply on the note hereinafter mentioned, retaining in his office at the lumber yard only sufficient of such proceeds to pay current bills and expenses of carrying on said business of lumber dealer, and for making change. And it is further agreed that the party of the first part will at least once a month,

to wit, on or before the tenth day of each month, during the continuance of the lien of this mortgage, or the extension thereof, account to the party of the second part for all sales and collections made during the previous month, and pay over to the party of the second part at such times of accounting the proceeds of all such sales and collections, to apply toward the payment of said promissory note, after deducting the actual and necessary expenses of carrying on said business of lumber dealer, and the actual and necessary living expenses of the party of the first part, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission hereinafter given. It is further agreed that the party of the first part may from time to time purchase new supplies of coal, lime, cement, paints, oils, lumber and building materials, for cash or its equivalent, to replenish and keep up said stock now on hand, and all such supplies so purchased shall be covered by this mortgage from and after their arrival in the City of Big Timber, before they are placed in said coal bins and in said lumber yard as well as after, and said mortgagor hereby agreeing that the said stock of coal, lime, cement, paints, oils, lumber and building materials shall at no time during the continuance of the lien of this mortgage or any extension and renewal thereof fall below a valuation of Six Thousand Dollars. [5]

Said property above-described being all of the property of the kind described, owned by the mortgagor at the time of making this mortgage. And

this mortgage includes, also, all property of like kind, hereafter and during the life of this mortgage, acquired by the mortgagor by either increase, or purchase, or by exchange, or substitution for property herein described, as security for the payment to the SCANDINAVIAN AMERICAN BANK OF BIG TIMBER, Montana, of Four Thousand One Hundred Sixty-five and no/100 (4,165.00) Dollars according to the terms of one promissory note bearing even date herewith, payable to the order of the mortgagee:

One note for \$4,165 Dollars, payable 'On Demand, after date, said note being for value received, with interest at the rate of eight per cent per annum from date until paid. The makers, sureties, endorsers, and guarantors agreeing to pay a reasonable attorney's fee, if suit is brought thereon, and severally waiving presentment for payment, notice of non-payment, protest notice of protest, and all benefits from the exemption laws of the State of Montana, and with the proper revenue stamps affixed and duly cancelled.

And also, as security for such further and additional sums of money as may, from time to time, hereafter, during the life of this instrument, be advanced and loaned by said mortgagee to said mortgagor, together with the interest thereon, which said future advances when made are to be evidenced by note from said mortgagor to said mortgagee and are to be as fully secured hereby as though the same were specifically described and set forth herein; but

for no greater amount, however, than Two Hundred Fifty and no/100 Dollars.

AND THIS MORTGAGE shall be void if such payment be made.

BUT IN CASE DEFAULT BE MADE in payment of the principal or interest as provided in said promissory note, then the said mortgagee, its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above-described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and reasonable attorney's fees, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, heirs or assigns. The sale under the said power of sale shall be advertised by notice posted in five public places in said County at least five days prior to such sale, one of which shall be posted at the designated place of sale, giving time and place of sale and a description of the property to be sold. Such sale must be at public sale and the mortgagee may become a purchaser thereat.

IT IS FURTHER AGREED, That the said mortgagor, heirs or assigns, shall have the right to remain in possession of the above-described property until default be made herein by said mortgagor; provided expressly, however, that if default be made in the payment of the principal or interest, as provided in said promissory note, or if prior to the maturity of

said indebtedness, said described property or any part thereof, shall be attached, seized or levied upon by or at the instance of any creditor or creditors of said mortgagor, or claimed by any other person or persons, or if the said mortgagor or any other person or persons shall remove, or attempt to remove, said property, or any part there, from the said County of Sweet Grass, State of Montana, or shall conceal, make away with, sell, or in any manner dispose of said described property, or any part thereof, or shall attempt so to do, or if the said mortgagee shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note, then and in such event, or in either of such events, the said mortgagee, its agents or attorney, successors or assigns, or such Sheriff, shall have the right to the immediate possession of said described property and the whole or any part thereof, and shall have the right at its option to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any [6] premises where said property, or any part thereof, may be found, and may at its option, regard the debt secured by this mortgage due and payable and may thereupon proceed and sell such property as above provided, and apply the proceeds of sale to the satisfaction of said debt as above provided. The exhibition of this mortgage, or a certified copy thereof shall be sufficient proof that any person claiming to act for the mortgagee is duly made, constituted and appointed agent

or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the mortgagee, its agent, attorney, successors or assigns.

IT IS FURTHER AGREED, In event this mortgage covers a crop, either cereals, roots, or otherwise, either sown, planted or growing, or to be sown, planted or grown, that when the said property hereby mortgaged is gathered or harvested the said mortgagee, or its assigns, shall be entitled to the immediate possession of the same, and shall have the right to harvest, thresh, transport and haul the same from the premises wherein the same have been grown and to sell and dispose of the same for the best price obtainable therefor; and that the cost and expense of such hauling and transporting shall be borne and paid by said party of the first part, and shall be covered by the lien of this mortgage; and that until such property is so sold and disposed of by said mortgagee or its assigns, the lien of this mortgage upon said property, wherever the same may be, shall continue and remain in full force and effect, it being understood that any moneys received by said mortgagee, or its assigns, upon the sale of said property, less the amounts secured by these presents shall be returned to the said mortgagor, heirs or assigns.

IT IS FURTHER AGREED, That the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose this mortgage by a suit as in the case of a mortgage on real estate.

THE MORTGAGOR hereby declares and represents to the mortgagee, that the mortgagor owns said property, and possesses lawful right and authority to sell, mortgage and dispose of the same, and that the same is free and clear of all liens and incumbrances, and the loan secured by this mortgage is obtained by virtue of these representations.

IN WITNESS WHEREOF, the said mortgagor hereunto affixes the signature and seal of said mortgagor, the day and year in this instrument first above written.

(Signed) W. N. RUSSELL, (Seal)

State of Montana,

County of Sweet Grass,—ss.

On this 29th day of June, in the year 1915, before me, Charles W. Campbell, a Notary Public for the State of Montana, residing at Big Timber, personally appeared Warren N. Russell, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certification first above written.

[Seal]

(Signed) CHARLES W. CAMPBELL.

Notary Public for the State of Montana, Residing at
Big Timber, Montana.

My commission expires May 31, 1918. [7]

State of Montana,

County of Sweet Grass,—ss.

E. J. Mo, being first duly sworn deposes and says:

That he is an officer of the Scandinavian Bank of Big Timber, the corporation named in the foregoing mortgage as mortgagee, viz.: its cashier, and makes this affidavit for and on behalf of said corporation. That the said mortgage is made in good faith to secure the amount named therein, and without design to hinder, delay or defraud creditors.

(Signed) E. J. MO.

State of Montana,

County of Sweet Grass,—ss.

I, J. E. Cameron, clerk and recorder of Sweet Grass County, Montana, do hereby certify that the above is a true and correct copy of a Chattel Mortgage, Warren N. Russell to Scandinavian American Bank of Big Timber, Montana.

Filed for record M 30th June, 1916, at 1:50 P. M. o'clock and filed in File 13 of Chattels Records of Sweet Grass County, Montana.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office.

Done at Big Timber, Sweet Grass County, Montana, this 15th day of May, 1916.

[Seal]

J. E. CAMERON,
Clerk and Recorder.

D. V. Highie,
Deputy. [8]

*In the District Court of the United States, for the
District of Montana.*

In the Matter of W. N. RUSSELL, Doing Business
Under the Name of W. N. RUSSELL LUM-
BER COMPANY, and W. N. RUSSELL, as an
Individual, Bankrupt.

Petition of John G. Ellingson, Trustee.

To Honorable E. M. NILES, Esquire, Referee in
Bankruptcy. Your Petitioners Respectfully
Show:—

1. Your petitioner John G. Ellingson says that he
is the fully, qualified and acting trustee herein and
that his appointment as such trustee has not been
revoked and is now in force.

2. Your petitioner, Bloedell Donovan Lumber
Mills, alleges and states that it is a corporation,
created, organized and existing under and by virtue of
the laws of the State of Washington, of the city of
Bellingham, State of Washington; that it was at the
time of the filing of the petition herein and now is, a
creditor of the estate of said bankrupt, and that its
claim herein has been filed and allowed by the Court
herein.

3. Your petitioner, McCormick Lumber Com-
pany, alleges and states that it is a corporation
created, organized and existing under and by virtue
of the laws of the State of Washington, in the city
of McCormick, State of Washington, and that its
claim herein has been filed and allowed by the Court
herein.

4. Your petitioner, The Standard Paint Company, alleges and states that it is a corporation created, organized and existing under and by virtue of the laws of the State of New York, of the City of New York, of the State of New York, and that its claim has been filed and allowed by the Court herein.

[9]

5. That on or about the 21st day of February, 1916, the above-named bankrupt did file in the United States District Court in and for the District of Montana, a voluntary petition in bankruptcy, and thereafter and on or about the 15th day of March, 1916, a judgment was duly made, entered and given, in said United States District Court, adjudging said W. N. Russell, doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual, a bankrupt.

6. That said W. N. Russell, the within-named bankrupt, for about one year prior to the 29th day of June, 1915, and up to the day of his adjudication herein as a bankrupt, was engaged in the business of selling and dealing in lumber, coal, cement, lime, and all business incidental thereto, in the City of Big Timber, Sweet Grass County, State of Montana, under the name and style of W. N. Russell Lumber Company.

7. Petitioners admit that at the time of the execution and delivery of the promissory note for the sum of Four Thousand One Hundred Sixty-five (\$4,165) Dollars mentioned in said Proof of Claim, the said bankrupt made, executed and delivered a mortgage conveying to said Scandinavian-American

Bank lots nine (9) and ten (10) in block sixteen (16) of the Original Plat of the Townsite of the City of Big Timber, Sweet Grass County, Montana, and a chattel mortgage on certain personal property described in said chattel mortgage to secure the payment of said promissory note for the sum of Four Thousand One Hundred Sixty-five (\$4,165) Dollars; said chattel mortgage also being given as security for the further and additional sum of the amount of Two Hundred Fifty & No/100 (\$250) Dollars. Said mortgages being [10] attached to said Proof of Claim and made a part thereof, and herein referred to and made a part thereof.

8. That the proof of debt of the Scandinavian American Bank of Big Timber, Montana, a banking corporation, organized and existing under and by virtue of the laws of the State of Montana, having its principal place of business at Big Timber, in the County of Sweet Grass, State of Montana, claiming to be a creditor of the said W. N. Russell, etc., was filed hereon in the — day of —, 1916, and that the same has not as yet been allowed. That said claim and no part thereof should be allowed as a secured or priority claim upon the property described in said chattel mortgage for the following reasons, to wit:

9. Your petitioners allege that they have no information or knowledge sufficient to form a belief as to whether or not at and before the filing of the petition herein, or at the time of the filing of the Proof of Claim herein by said Scandinavian-American Bank, the said W. N. Russell, doing business

under the name of W. N. Russell Lumber Company and W. N. Russell as an individual, was indebted to said Scandinavian-American Bank of Big Timber, Montana, in the sum of Four Thousand Six Hundred Twenty & 90/100 (\$4620.90) Dollars, or in any sum at all, in excess of the sum of Two Thousand and no/100 (\$2000) Dollars, and your petitioners therefore allege that bankrupt and his estate is not indebted to said Bank in any sum whatever in excess of Two Thousand and no/100 (\$2000) Dollars, (including payment made by trustee since adjudication.)

10. Your petitioners state that they are informed and believe and therefore allege the fact to be that said pretended chattel mortgage was given by said Russell [11] and accepted by said Scandinavian American Bank with the intent then and there had and entertained by said Russell and said Bank to hinder, delay and defraud the then existing and subsequent creditors of the said Russell of their just demands, in the manner and by the means among other things as follows, to wit:

Your petitioners state that they are informed and believe and therefore allege the fact to be that subsequent to the 29th day of June, 1915, the date of the execution of said promissory note and chattel mortgage referred to in said Proof of Claim, and to the giving of said note and chattel mortgage, and up to and until the time that the within-named bankrupt filed his petition herein and was adjudged a bankrupt, and up to and until the time that your petitioner John G. Ellingson took possession of the per-

sonal property of said bankrupt, described in said pretended chattel mortgage, and that added thereto by said bankrupt, the provisions and agreements in said chattel mortgage contained were disregarded, broken and violated by said W. N. Russell, his agents, servants and employees, and that said provisions and agreements of said chattel mortgage so broken, violated and disregarded, were violated broken and disregarded by said W. N. Russell, bankrupt, his agents, servants and employees, by and with the knowledge, advice, consent and understanding and knowledge, of said Scandinavian-American Bank of Big Timber, Montana, its officers, agents, servants and employees, in this:

(a) That the provisions and agreements in said chattel mortgage contained authorizing said W. N. Russell, said bankrupt, to sell from the stock of goods, wares and merchandise, covered by said chattel mortgage, and from other goods, wares and merchandise of like kind thereafter [12] added to, at retail to the regular and other customers of said W. N. Russell, for cash, or on not to exceed thirty days' credit, to responsible parties, was disregarded, broken and violated by said W. N. Russell, said bankrupt, in that credit was given by said W. N. Russell, said bankrupt, his agents, servants, and employees, with the knowledge and consent of said Scandinavian-American Bank of Big Timber, Montana, its officers, agents, servants and employees, to the regular and other customers of said W. N. Russell for a period greatly in excess of thirty days, and that there is now due and owing from said customers

a sum in excess of the sum of Two Thousand Dollars (\$2,000.00).

(b) That the provisions and agreements in said chattel mortgage contained requiring said W. N. Russell, said bankrupt, to keep an accurate account of all sales made either for cash or on not to exceed thirty days' credit, and during the banking hours of each day deposit the proceeds of such sales in the bank of the mortgagee (Scandinavian-American Bank) to the credit of said Scandinavian-American Bank, to apply on said promissory note, after retaining in the office of said bankrupt, sufficient of the proceeds of such sales, to pay current bills and expenses of carrying on the said business and for making change, was disregarded, broken and violated by said W. N. Russell, bankrupt, and his agents, servants and employees, and by and with the knowledge, consent and understanding of the said Scandinavian-American Bank, its officers, agents, servants, and employees, in that notwithstanding there were sales and collections made during each day, the proceeds of all sales and collections, after retaining in said office sufficient of such proceeds to pay current bills and expenses of carrying on said business and making change, were not during the banking hours of each day, or at all, deposited in the bank of said Scandinavian-American [13] Bank, or in any bank, to the credit of said Scandinavian-American Bank, to apply on said note, but on the contrary said proceeds were deposited in said Scandinavian-American Bank to the credit of W. N. Russell, said bankrupt, subject to his demand and check, and said proceeds were

drawn out of said bank and used by said W. N. Russell, said bankrupt, subject to his demand and check, said proceeds were drawn out of said bank and used by said W. N. Russell, said bankrupt, and converted by him to his own use and used by him contrary to and in violation of the provisions of said chattel mortgage, all with the knowledge and consent of the said Scandinavian-American Bank, of Big Timber, Montana, its officers, agents, servants and employees.

(c) That the provisions and agreements in said chattel mortgage contained requiring said W. N. Russell at least once a month, to wit: on or before the 10th day of each and every month during the continuance of said chattel mortgage, or any extension thereof, to account to said Scandinavian-American Bank for all sales and collections made during the previous month, and pay over to said Scandinavian-American Bank at such times of accounting the proceeds of all such sales and collections to apply towards the payment of said promissory note, after deducting the actual and necessary expenses of carrying on said business of said W. N. Russell as a lumber dealer and the actual and necessary living expenses of said W. N. Russell, and after deducting enough money to pay the bills falling due for goods purchased to replenish said stock of goods, wares and merchandise, was disregarded, broken and violated, in that there was no accounting to said Scandinavian-American Bank by said W. N. Russell on the 10th day of [14] each month, while said pretended chattel mortgage was in force, or at all; that notwithstanding there were sales and collections made dur-

ing each month that said pretended chattel mortgage was in force, in excess of the actual and necessary expenses of carrying on said business and the living expenses of said W. N. Russell, and in excess of enough money to pay bills falling due for goods, wares and merchandise, purchased to replenish said stock of goods, wares and merchandise, the proceeds of such sales and collections, after deducting the expenses of carrying on said business and the necessary living expenses of said Russell, and enough money to pay bills falling due for goods, wares and merchandise purchased to replenish said stock of goods, wares and merchandise, were not paid over to said Scandinavian-American Bank of Big Timber, Montana, on the 10th day of each month, or at all; that on the contrary such proceeds were paid into said Scandinavian-American Bank to the credit of said Russell and subject to his demand and check and said proceeds were drawn out and used by said W. N. Russell, and converted by him to his own use and used by him in violation of the provisions and agreements in said chattel mortgage contained, and that said provision and agreement so disregarded and violated by said W. N. Russell, and was disregarded, violated and broken by and with the advice, consent, understanding and knowledge of said Scandinavian-American Bank, its officers, agents, servants and employees.

That during all of the time said pretended chattel mortgage was in force there was money over and above the amount required to be deducted, the proceeds of sales [15] made and collections made

from the regular and other customers of said Russell in the possession of said Russell and in the said Scandinavian-American Bank to the credit of said Russell, which was not applied on the payment of said note and debt as required by the provisions and agreements in said chattel mortgage contained.

(d) That the provisions and agreements in said chattel mortgage contained, granting permission to said W. N. Russell to purchase from time to time new goods, wares and merchandise for cash, or its equivalent, to replenish and keep up the said stock on hand, at the time of the giving of said pretended chattel mortgage, was disregarded, violated and broken, in that goods, wares and merchandise to a large amount were purchased by said W. N. Russell, his agents, servants and employees, from divers and sundry persons and corporations, other than for cash, to wit: on credit, and such merchandise was not paid for in cash, or at all, and that such goods, wares and merchandise so bought have not been paid for, and said goods, wares and merchandise, so bought on credit, were bought and purchased by said Russell with the knowledge and consent of said Scandinavian-American Bank, its officers, agents, servants and employees, and such goods, wares and merchandise so purchased were placed in the buildings and lumber yards of said Russell, used and partly sold by him in his said business, and such said goods, wares and merchandise as were unsold at the time of the filing of the petition herein and at the time of the adjudication of said Russell as a bankrupt, were taken possession of by said John G. Ellingson, [16]

Trustee herein, pursuant to his appointment as such trustee.

(e) That between the 29th day of June, 1915, and the date of the filing of the petition herein, during the existence of said pretended chattel mortgage, the said W. N. Russell was allowed and permitted by said Scandinavian-American Bank, its officers, agents, servants and employees, to sell and dispose of a portion of the goods, wares and merchandise included in said chattel mortgage and convert the proceeds arising from such sales to his own use.

11. That exclusive of the property so pretended to be mortgaged by said chattel mortgage said W. N. Russell did not retain sufficient property to pay the debts then and there owing by him.

12. Petitioners further state that they are informed and believe and therefore allege the fact to be that at the time of the giving of said promissory note and the executing and delivering of said pretended chattel mortgage on the 29th day of June, 1915, the said W. N. Russell was indebted to divers and sundry persons, firms and corporations to an amount exceeding the sum of three thousand dollars (\$3,000), which said indebtedness was in addition to his indebtedness to the Scandinavian-American Bank, and that divers and sundry persons, firms and corporations who were on the said 29th day of June, 1915, creditors of said Russell, have filed and proven their claims in the United States District Court in and for the District of Montana, in bankruptcy, by filing the same with the Honorable E. M. Niles, Referee in Bankruptcy for the United States Dis-

trict Court in and for the District of Montana; that said claims have been allowed by said [17] Referee in Bankruptcy to an amount exceeding Three Thousand (\$3,000) Dollars.

13. Your petitioners state that they are informed and believe and therefore allege the fact to be that divers and sundry persons, firms and corporations, creditors of said W. N. Russell, at the time said Russell made and executed the pretended chattel mortgage set out herein, and divers and sundry persons, firms and corporations, creditors of said Russell at the time of the filing of the petition herein and at the time of the adjudication of said Russell as a bankrupt, are now creditors of said Russell and the estate of said Russell, bankrupt, and that said creditors have filed and proven their claims in the United States District Court in and for the District of Montana, in bankruptcy, by filing the same with the Honorable E. M. Niles, Referee in Bankruptcy, of the United States District Court in and for the District of Montana, and that the amount of the claims filed and proven, exclusive of the claim of the Scandinavian-American Bank, amount to a sum in excess of Eight Thousand (\$8,000) Dollars; that the same have been allowed by said Referee.

14. Your petitioners further state that the Trustee herein has not money and property in his possession or under his control except the sum of One Thousand (\$1,000) Dollars, with which to pay said claims so filed and allowed, or any part thereof and your petitioners allege that said Trustee has not sufficient assets in his hands to satisfy and pay the

claims of the said W. N. Russell, bankrupt.

15. Your petitioners further allege that the said pretended chattel mortgage was and is fraudulent [18] and void, and was made and entered into by said Scandinavian-American Bank and said Russell for the purpose of hindering, delaying and defrauding the then-existing and subsequent creditors of said Russell, and that the acts of said Scandinavian-American-Bank and said Russell were a scheme to hinder, delay and defraud the then-existing and subsequent creditors of said Russell; that said pretended mortgage was fraudulent and void as to your petitioner and trustee herein, and the existing and subsequent creditors of said W. N. Russell, all of which the said Scandinavian-American Bank and the said W. N. Russell had full knowledge, and that at the time said chattel mortgage was executed and delivered it was not intended, and it was understood and agreed that the provisions and agreements therein contained were not to be carried out between the parties thereto and that said Russell was to conduct the business and to sell the merchandise in the same manner as though the said chattel mortgage had not been executed. That said business was conducted after the execution and delivery of said chattel mortgage as though the said chattel mortgage had not been executed and delivered; all with the knowledge, consent and understanding of said bank, its officers, agents, servants and employees.

16. Your petitioners allege that at the time of the filing of the petition herein and at all times since the value of said real property securing the debt of said

Scandinavian-American Bank, was, and now is the sum of Eighteen Hundred thirty and no/100 (\$1,830) Dollars, and the value of the personal property which came into the possession of said Trustee described in and covered by said pretended chattel mortgage set out in the Proof [19] Claim herein, was, and now is the sum of One Thousand Seven Hundred Seventy & no/100 (\$1,770) Dollars.

17. That at the time of the execution and delivery of said chattel mortgage the stock of merchandise described in said mortgage did not exceed in value the sum of Thirty-five Hundred and no/100 (\$3,500) Dollars.

18. Your petitioners allege that John G. Ellingson by virtue of his appointment as Trustee herein, he became vested with whatever title said Russell had to any and all property of said Russell and as such trustee he is lawfully entitled to the possession of the same and also any and all property transferred by said Russell in fraud of his creditors as of the date that said Russell filed his petition herein.

19. That the attorneys of said claimant are Messrs. Miller & O'Connor, of Livingston, Montana, and Chas. W. Campbell, Esq., of Big Timber, Montana.

20. That no previous application has been made to this or any other court for the order herein asked for.

WHEREFORE, your petitioners pray that the said pretended chattel mortgage be set aside and declared to be null and void and that the claim of the Scandinavian-American Bank be allowed for such

sum and amount as shall be found by the Court to be due to said Scandinavian-American Bank.

That the claim of said Scandinavian-American Bank to the real property conveyed by the said mortgage bearing date the 29th day of June, 1915, and filed in the office of the county clerk and recorder of Sweet Grass County, State of Montana, on the 30th day of June, 1915, to the [20] extent of the value of the property in said mortgage described, be allowed as a secured claim and that the said Scandinavian-American Bank be allowed the proceeds arising from the sale of the real property described in said mortgage, less the costs of administration thereof.

That the said Scandinavian-American Bank, after the payment to it of the proceeds of the sale of said real property, less the costs of administration, be allowed the balance of its said claim in such sum as may be found due to it as a general creditor of said bankrupt and of said estate, without security or priority of payment, and that petitioners have full equitable relief.

FRANK ARNOLD,

Attorney for Petitioners. [21]

State of Montana,
County of Sweet Grass,—ss.

I, John G. Ellingson, one of the petitioners mentioned in and described in the foregoing petition do hereby make solemn oath that the statement of facts contained therein are true to the best of my knowledge, information and belief.

JOHN G. ELLINGSON.

Subscribed and sworn to before me this 31 day of July, 1916.

[Seal]

J. B. SELTERS,

Notary Public for the State of Montana, Residing at Big Timber, Montana.

My commission expires the 31 day of Oct., 1917.

[22]

In the District Court of the United States for the District of Montana.

AT A COURT OF BANKRUPTCY HELD IN AND FOR THE DISTRICT OF MONTANA, AT LIVINGSTON, MONTANA THIS 23d DAY OF DECEMBER, A. D. 1916.

In the Matter of W. N. RUSSELL, Doing Business Under the Name of W. N. RUSSELL LUMBER COMPANY, and W. N. RUSSELL as an Individual, Bankrupt.

Report of Referee in Bankruptcy.

Present: E. M. NILES, Esq. Referee.

This matter having come on to be heard upon the objections of John G. Ellingson as trustee, Bloedell, Donovan Lumber Mills, (a Corporation), McCormick Lumber Co., (a Corporation), The Standard Paint Company, (a Corporation), to the claim of the Scandinavian American Bank, (a banking Corporation), which said claim and objections have heretofore been filed herein; Mr. Charles W. Campbell and Messrs. Miller and O'Connor appearing as attorneys for the Scandinavian American Bank, and Frank Arnold appearing as attorney for the Trus-

tee and other objectors. Witnesses being duly sworn and examined on the part of the claimant and objectors and the evidence being closed, the cause was submitted to the court for consideration and decision and the court being fully advised in the premises and after due deliberation thereon, finds as follows:

FINDINGS OF FACTS.

1. That on or about the 15th day of March, A. D. 1916, a judgment was duly made, entered and given in said United States District Court, adjudging said W. N. Russell, doing business under the firm name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual, a bankrupt. [23]

2. That said W. N. Russell, the within named bankrupt, for about one year prior to the 29th day of June, 1915, and up to the day of his adjudication herein as a bankrupt, was engaged in the business of selling and dealing in lumber, coal, cement, lime, and all business incidental thereto, in the City of Big Timber, Sweet Grass County, State of Montana, under the name and style of W. N. Russell Lumber Company.

3. That on the 29th day of June of 1915, W. N. Russell made, executed, and delivered to the Scandinavian American Bank of Big Timber Montana, his promissory note in writing for the sum of Four Thousand One Hundred and Sixty-five Dollars, (\$4,165), with interest thereon at the rate of 8% per annum, and thereafter on said date said W. N. Russell, made, executed and delivered a chattel mortgage on certain personal property described in said chattel mortgage to secure payment of said

promissory note, said chattel mortgage also being given as security for the payment of an additional sum of Two Hundred and Fifty Dollars, (\$250), to be thereafter advanced.

4. That said chattel mortgage was filed in the office of the County Clerk and Recorder of Sweet Grass County, Montana on the 30th day of June, 1915.

5. That the Scandinavian American Bank has filed its claim herein in the sum of Four Thousand, Six Hundred and Twenty Dollars and 90/100, (\$4,620.90), and that there was due to said Scandinavian American Bank at the time of the filing of its proof of claim herein on the 15th day of May, 1916, the sum of Four Thousand Six Hundred and Twenty Dollars and 90/100 (\$4,620.90) made up as follows: The sum of Four Thousand One Hundred and Sixty-five Dollars (\$4,165), the amount of the promissory note, made, executed and delivered June 29, 1915; the sum of two hundred and fifty dollars, (\$250), thereafter advanced by said Scandinavian-American Bank to said W. N. Russell, under the mortgage; and the [24] balance, the sum of Two Hundred Five Dollars and 90/100, (\$205.90), further advanced by said Scandinavian-American Bank to said W. N. Russell.

6. That at the time of the execution and delivery of said chattel mortgage and said promissory note, it was understood and agreed by and between the Scandinavian American Bank, its office, officers, agents and employees and said W. N. Russell, that the terms and conditions of said chattel mortgage

were not to be carried out and were to be disregarded, broken and violated, and no change was to be made in the manner in which said Russell was to carry on his business.

7. That the provisions and agreements in the said chattel mortgage contained, authorizing said W. N. Russell to sell from the stock of goods, wares and merchandise, covered by said chattel mortgage and from other goods, wares and merchandise of like kind thereafter added to, at retail to the regular and other customers of said W. N. Russell, for cash, or not to exceed thirty days credit to responsible parties was disregarded, broken and violated by said W. N. Russell, said bankrupt, in that credit was given by said W. N. Russell, said bankrupt, his agents, servants, and employees, with the knowledge and consent of said Scandinavian-American Bank of Big Timber Montana, its officers, agents, servants, and employees, to the regular and other customers of said W. N. Russell for a period greatly in excess of thirty days, and large amounts of goods, wares and merchandise were sold to the regular and other customers of said W. N. Russell by said W. N. Russell on credit for periods of sixty and ninety days, between June 29th, 1915 and February 21st, 1916, and that said sales so made were made by and with the knowledge and consent of said Scandinavian-American [25] Bank, its officers, agents, servants and employees.

8. That on February 21st, 1916, the dates of the filing of the petition herein and at the time said W. N. Russell was adjudged bankrupt, there was due and

owing from the regular and other customers of said W. N. Russell, the sum of One Thousand six Hundred and Ninety-four Dollars and $95/100$ (1,694.95), for goods, wares and merchandise sold on credit and delivered by said W. N. Russell between the 29th day of June, A. D. 1915, and the 21st day of February A. D. 1916.

9. That the provisions and agreements in the said chattel mortgage contained requiring said W. N. Russell to keep an accurate account of all sales made either for cash, or on not to exceed thirty days credit, and during the banking hours of each day deposit the proceeds of such sales in the Scandinavian-American Bank to the credit of the said Scandinavian-American Bank to apply on the promissory note dated June 29th, 1915, after retaining sufficient of the proceeds of such sales to pay current bills and expenses of carrying on said business and for making change, was disregarded, broken and violated by said W. N. Russell, his agents, servants and employees, and that the same was broken by and with the knowledge, consent and understanding of the said Scandinavian-American Bank, its officers, agents, and employees; and the court finds that there were sales and collections made between the 29th day of June, 1915, and the 21st day of February, 1916; and that the proceeds of such sales and collections after retaining in the office of said W. N. Russell sufficient of such proceeds to pay current bills and expenses of carrying on the business of said W. N. Russell, were in excess of the sum of Two Thousand Dollars and were not during the banking

hours of each day, or at all, or at any time deposited in the Scandinavian-American Bank, or in any bank to apply on said note, and the proceeds of said sales and collections were deposited in said Scandinavian-American Bank to the credit of said W. N. Russell subject to his demand and check and said proceeds were drawn out of [26] said bank and used by said W. N. Russell, said bankrupt, and converted by him to his own use and a part thereof used by said W. N. Russell to pay creditors of the said W. N. Russell, who were creditors of said W. N. Russell on the 29th day of June, 1915, and for a long time prior thereto; that said money was so used and converted by said W. N. Russell by and with the knowledge and consent of Scandinavian-American Bank, its agents, servants and employees.

10. That the provisions and agreements in said chattel mortgage contained requiring said W. N. Russell at least once a month to-wit; on or before the 10th day of each and every month during the continuance of said chattel mortgage or any extension thereof, to account to said Scandinavian-American Bank for all sales and collections made during the previous month and pay over to said Scandinavian-American Bank at such times of accounting the proceeds of all such sales and collections to apply toward the payment of the promissory note dated June 29, 1915, given by said Russell to Scandinavian-American Bank, after deducting the actual and necessary expenses of carrying on the business of said W. N. Russell as a lumber dealer and as the other necessary living expenses of said W. N. Rus-

sell, and after deducting enough money to pay bills falling due for goods purchased to replenish said stock of goods, wares and merchandise, was broken, disregarded, and violated and said W. N. Russell made no accounting to said Scandinavian-American Bank on the 10th day of each month between the 29th day of June, 1915, and the 21st day of February, 1916, or at all.

The Court finds that there was on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, money in the hands of said W. N. Russell, the proceeds of sales and collections made by said Russell, in excess of money required for the necessary expenses of carrying said business [27] and the living expenses of said Russell and in excess of money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares, and merchandise in that said monies, the proceeds of sales and collections were paid into said Scandinavian-American Bank to the credit of said Russell and converted by him to his own use and large sums were paid by said Russell to the creditors of said W. N. Russell who were creditors of said W. N. Russell on June 29th, 1915, and for a long time prior thereto.

11. That said Scandinavian-American Bank did not demand an accounting on the 10th day of each month between the 29th day of June, 1915, and the 21st day of February, 1916, or at all, and that the failure of said Russell to account to said Scandinavian-American Bank on the 10th day of each and every month between the 29th day of June, 1915, and

the 21st day of February 1916, was consented to and acquiesced in by said Scandinavian-American Bank, its officers, agents, servants and employees.

12. That between the 29th day of June, 1915, and the 21st day of February, 1916, there was at divers and sundry times and on the 10th day of each and every month large sums of money in the possession of the said defendant, W. N. Russell, over and above the monies required by said Russell to pay the necessary expenses of carrying on said business and the living expenses of said Russell, and money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares and merchandise mortgaged to said bank, the proceeds of sales and collections made from the regular and other customers of said Russell in the possession of said Russell, and in the Scandinavian-American Bank, to the credit of said Russell which should and could have been applied toward the said payment of said promissory note of June 29th, 1915, by said Russell, and that the same was not applied toward the [28] payment of said note, but was converted by said Russell to his own use and a large part thereof paid to divers and sundry persons who were creditors of said Russell on the 29th day of June, 1915, and for a long time prior thereto; that said Scandinavian-American Bank knew that said monies were in the possession of said W. N. Russell at divers and sundry times and on the 10th day of each and every month, between the 29th day of June, 1915 and the 21st day of February 1916, and said Scandinavian-American Bank, its officers,

agents, servants and employees knew of and consented to the conversion of said monies by said W. N. Russell.

13. That the provisions and agreements in the said chattel mortgage which granted permission to said W. N. Russell to purchase from time to time new goods, wares and merchandise for cash or its equivalent to replenish and keep up the stock of merchandise on hand at the time of the giving of the promissory note and chattel mortgage on the 29th day of June 1915, was disregarded, broken, and violated; and said W. N. Russell at divers and sundry times between the 29th day of June, 1915, and the 21st day of February, 1916, purchased goods, wares and merchandise in large sums and in an amount exceeding the sum of Two Thousand Dollars, (\$2,000), on credit and did not pay cash therefor, or at all, and did not pay any sum or sums of monies for said goods, wares and merchandise; and said goods, wares and merchandise so bought on credit between the 29th day of June, 1915, and the 21st day of February, 1916, were received and taken into the warehouse and lumber yards of said W. N. Russell at Big Timber, Montana, and the same was used, and a part thereof sold in the ordinary course of business of said W. N. Russell between the 29th day of June, 1915, and the 21st day of February, 1916, and a portion thereof was in the lumber yards and warehouse of said W. N. Russell, at Big Timber, Montana, on the 21st day of February, 1916; [29] and at the time of the adjudication herein, the goods, wares and merchandise so on hand unsold were taken pos-

session of by the Trustee herein; that said purchases of goods, wares, and merchandise on credit were purchased on credit by and with the knowledge, consent and understanding of the Scandinavian-American Bank, its officers, agents, servants and employees.

14. That at the time of the execution and delivery of said note and chattel mortgage by said Russell to the Scandinavian-American Bank on the 29th day of June, 1915, said W. N. Russell was indebted to divers and sundry persons, firms and corporations, to a large amount and in a sum in excess of the sum of Three Thousand Dollars, (\$3,000), exclusive of the indebtedness then owing to the Scandinavian-American Bank on the 21st day of February, 1916, was and a large amount thereof is now owing, and the claims of said creditors have been proven and filed herein and allowed by the court herein.

15. That exclusive of the property covered by the said chattel mortgage now in the hands of Trustee herein, the Trustee herein has in his possession, approximately the sum of One Thousand Dollars, (\$1,000), to pay the costs of administration and for distribution among the creditors who have filed their claims herein, and that exclusive of the property covered by said chattel mortgage, which the court finds to the value of One Thousand Seven Hundred and Seventy Dollars (\$1,770), the Trustee herein will not have sufficient assets and funds to pay the creditors of said W. N. Russell, who have filed their claims herein, the amount of their respective claims in full, and the assets now in the hands of said Trustee exclusive of the property covered

by said chattel mortgage, will not pay to exceed the sum of ten cents on the dollar to creditors who have filed their claims herein; that there are no other assets that will come into the hands of the trustee hereafter. [30] That the amount of the Claims filed and allowed herein exceeds the sum of Five Thousand Dollars, (\$5,000).

16. That at the time of the making and delivery of said promissory note of the 29th day of June, 1915, the said W. N. Russell, made, executed and delivered to the Scandinavian-American Bank, a mortgage on certain real estate as security for the payment of said promissory note; that said real estate has been sold under order of court herein and the value of the same as agreed upon by the parties hereto, is the sum of One Thousand Eight Hundred and Thirty Dollars, (\$1,830), Fifteen Hundred Dollars (\$1,500) of said amount having been paid to said Bank, and the sum of Three Hundred and Thirty Dollars, (\$330), being held by the Trustees towards costs of administration.

17. That John G. Ellingson, by virtue of his appointment as Trustee herein, became vested with all the rights, title and the interest of said Russell, to any and all property of said Russell, owned by him on the 21st day of February, 1916, and he is entitled to the possession of the personal property described in the chattel mortgage dated June 29th, 1915 or the proceeds thereof.

18. That all of the allegations contained in the objections filed herein against the claim of the Scandinavian-American Bank are true.

CONCLUSIONS OF LAW.

Wherefore, by reasons of the law and premises, it is ordered and adjudged:

1. That the chattel mortgage dated June 29th, 1915, given by said W. N. Russell to Scandinavian-American Bank is fraudulent and void as to the Trustee herein, and the creditors of said W. N. Russell and is void and of no effect. [31]

2. That the claim of the Scandinavian-American Bank is allowed as a preferred, priority and secured claim to the amount of One Thousand Eight Hundred and Thirty Dollars, (\$1,830), the value of the real property described in the mortgage dated June 29th, 1915, given to secure the payment of the promissory note of June 29th, 1915, (less costs of administration).

3. That the claim of the Scandinavian-American Bank is disallowed as a preferred, priority and the secured claim in the sum of Two Thousand Seven Hundred and Ninety Dollars and 90/100 (\$2,790.90), and the claim of the Scandinavian-American Bank is allowed in the sum of Two Thousand Seven Hundred and Ninety Dollars and 90/100, (\$2,790.90), the same to be paid pro rata with the other creditors of said bankrupt, who have filed or may hereafter file their claims herein.

E. M. NILES,
Referee. [32]

*In the District Court of the United States for the
District of Montana.*

COPY.

In the Matter of W. N. RUSSELL, Doing Business
Under the Name of W. N. RUSSELL LUM-
BER COMPANY, and W. N. RUSSELL as an
Individual,

Bankrupt.

**Petition to U. S. District Court to Review Order of
Referee.**

To the Honorable GEORGE M. BOURQUIN, Judge
of the District Court of the United States for
the District of Montana.

The petition of the Scandinavian-American Bank
of Big Timber, a banking corporation, organized
and existing under and by virtue of the laws of the
State of Montana, and having its principal place of
business at Big Timber, County of Sweet Grass,
State of Montana, one of the creditors of the said
bankrupt, respectfully represents that on the twenty-
third day of December, 1916, manifest error to the
prejudice of the complainant herein was made by
the referee in said matter in a finding and order dis-
allowing and expunging the claim of said corpora-
tion against said bankrupt from the list of allowed
preferred claims upon the trustee's record in said
case. The errors complained of are as follows, to
wit:

First. That the evidence adduced before said
referee and set out in the transcript herewith sub-

mitted shows that the chattel mortgage dated June 29th, 1915, and given by said W. N. Russell to the Scandinavian-American Bank of Big Timber, is not fraudulent and void as to the trustee herein, and is not fraudulent and void as to the creditors of said W. N. Russell; and that said evidence further shows that chattel mortgage aforesaid to be a valid and subsisting lien upon the assets of the said W. N. Russell in favor of the Scandinavian-American Bank of [33] Big Timber, which lien should be allowed said bank as a lawful preference for the satisfaction of its claims against the said W. N. Russell, bankrupt, so far as the same are secured thereby.

Second. That said referee erred in his fifth finding of fact in that there is no evidence to show that the Scandinavian American Bank is chargeable with the sum of Sixteen hundred and Ninety-four and 95/100 Dollars (\$1694.95) for merchandise sold for the credit of the said bank; but that the evidence adduced before the said referee shows that the said Scandinavian American Bank is entitled to have the lien of its mortgage extended to cover the receipts from the sale of such merchandise.

Third. That said referee erred in his sixth finding of fact in that there is no evidence to show that at the time of the execution and delivery of said chattel mortgage and promissory note, it was understood by and between the Scandinavian American Bank, its officers, agents, and employees and said W. N. Russell, that the terms and conditions of said chattel mortgage were not to be carried out and were to be disregarded, broken and violated, and no

change was to be made in the manner in which said Russell was to carry on his business.

Fourth. That said referee erred in his seventh finding of fact in that there is no evidence to show that the provisions and agreements in the said chattel mortgage contained, authorizing said W. N. Russell to sell from the stock of goods, wares, and merchandise, covered by said chattel mortgage and from other goods, wares and merchandise of like kind thereafter added to, at retail to the regular and other customers of said W. N. Russell, for cash, or not to exceed thirty days credit to responsible parties was disregarded, broken and violated by said W. N. Russell, said bankrupt, in that credit was given by said W. N. Russell, said bankrupt, his agents, servants, and [34] employees, with the knowledge and consent of the said Scandinavian American Bank of Big Timber, its officers, agents, servants, and employees, to the regular and other customers of said W. N. Russell for a period greatly in excess of thirty days, and large amounts of goods, wares and merchandise were sold to the regular and other customers of said W. N. Russell by said W. N. Russell on credit for periods of sixty and ninety days, between June 29, 1915, and February 21st, 1916, and that said sales so made were made by and with the knowledge and consent of the said Scandinavian American Bank, its officers, agents, servants, and employees.

Fifth. That said referee erred in his eighth finding of fact in that there is no evidence to show that on February 21st, 1916, the date of the filing of the petition herein, and at the time said W. N. Russell

was adjudged bankrupt, there was due and owing from the said W. N. Russell's regular and other customers, the sum of One Thousand Six Hundred and Ninety-four and 95/100 Dollars (\$1694.95), for goods, wares and merchandise sold on credit and delivered by the said W. N. Russell between the 29th day of June, 1915, and the 21st day of February, 1916 A. D.

Sixth. That said referee erred in his ninth finding of fact in that there is no evidence to show that the provisions and agreements in the said chattel mortgage contained, requiring said W. N. Russell to keep an accurate account of all sales made either for cash, or on not to exceed thirty days' credit, and during the banking hours of each day to deposit the proceeds of such sales in the Scandinavian American Bank to the credit of the said Scandinavian American Bank to apply on the promissory note dated June 29th, 1915, after retaining sufficient of the proceeds of such sales to pay current bills and expenses of carrying on said business and for making change, were disregarded, broken and violated by said W. N. Russell, his agents, [35] servants and employees, and that the same were broken by and with the knowledge, consent and understanding of the said Scandinavian American Bank, its officers, agents and employees; and that said referee further erred in finding that there were sales and collections made between the 29th day of June, 1915, and the 21st day of February, 1916, the proceeds of which, after retaining in the office of said W. N. Russell sufficient of such proceeds to pay current bills and expenses

of carrying on the business of said W. N. Russell, were in excess of the sum of Five Thousand and No/100 Dollars (\$5,000), and were not during the banking hours of each day, or at all, or at any time deposited in the Scandinavian American Bank, or in any bank, to apply on said note; and that the proceeds of said sales and collections were deposited in said Scandinavian American Bank to the credit of said W. N. Russell, subject to his demand and check and that said proceeds were drawn out of said bank and used by said W. N. Russell, said bankrupt, and converted by him to his own use; and that a part thereof used by said W. N. Russell to pay creditors of the said W. N. Russell, who were creditors of the said bankrupt on the 29th day of June, 1915, and for a long time prior thereto, was converted by the said W. N. Russell to his own use, and that such conversion was by and with the knowledge and consent of the said Scandinavian American Bank, its agents, servants and employees.

Seventh. That said referee erred in his tenth finding of fact in that there is no evidence to show that the provisions and agreements in said chattel mortgage contained, requiring said W. N. Russell at least once a month, to wit, on or before the 10th day of each and every month during the continuance of said chattel mortgage, or any extension thereof, to account to said Scandinavian American Bank for all sales and collections made during the previous month and to pay over to [36] said Scandinavian American Bank at such times of accounting the proceeds of all such sales and collections to apply

toward the payment of the promissory note dated June 29th, 1915, given by said W. N. Russell to Scandinavian American Bank, after deducting the actual and necessary expenses of carrying on the business of said W. N. Russell as a lumber dealer and the other necessary living expenses of said W. N. Russell, and after deducting enough money to pay bills falling due for goods purchased to replenish said stock of goods, wares and merchandise, were broken, disregarded and violated by said W. N. Russell and the said Scandinavian American Bank; and that said bankrupt made no accounting to the said Scandinavian American Bank on the 10th day of each month between the 29th day of June, 1915, and the 21st day of February, 1916, or at all. That said referee erred further in finding that there was on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, money in the hands of the said W. N. Russell, the proceeds of sales and collections made by said Russell, in excess of money required for the necessary expenses of carrying on said business and for the living expenses of said Russell and in excess of money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares and merchandise; and that said money, the proceeds of sales and collections, were paid into the said Scandinavian American Bank to the credit of said Russell and were converted by him to his own use by payment to the creditors of the said W. N. Russell who were creditors of the said

bankrupt on June 29th, 1915, and for a long time prior thereto.

Eighth. That said referee erred in his eleventh finding of fact in that there is no evidence to show that the said Scandinavian American Bank did not demand an accounting on the 10th day of each month between the 29th day of [37] June, 1915, and the 21st day of February, 1916, or at all; and that the failure of the said Russell to account to said Scandinavian American Bank on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, was consented to and acquiesced in by the said Scandinavian American Bank, its officers, agents, servants and employees.

Ninth. That said referee erred in his twelfth finding of fact in that there is no evidence to show that between the twenty-ninth day of June, 1915, and the twenty-first day of February, 1916, there was at divers and sundry times and on the 10th day of each and every month a large sum of money in the possession of the said bankrupt Russell over and above the moneys required by said Russell to pay the necessary expenses of carrying on said business and the living expenses of said Russell, and the money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares and merchandise mortgaged to said bank; and that such money was the proceeds of sales and collections made from the regular and other customers of said Russell in the possession of said Russell, and deposited in the Scandinavian American

Bank to the credit of said Russell, which should and could have been applied toward the payment of said promissory note of June 29th, 1915, by said Russell, and that the same was applied toward the payment of said note, but was converted by said Russell to his own use through payment to divers and sundry persons who were creditors of said Russell on the 29th day of June, 1915, and for a long time prior thereto; and that said Scandinavian American Bank knew that said moneys were in the possession of said W. N. Russell at divers and sundry times and on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, and that said Scandinavian American Bank, its officers, agents, servants, and employees knew of and consented [38] to the conversion of said moneys by said W. N. Russell.

Tenth. That said referee erred in his thirteenth finding of fact in that there is no evidence to show that the provisions and agreements in the said chattel mortgage which granted permission to said W. N. Russell to purchase from time to time new goods, wares and merchandise for cash or its equivalent to replenish and keep up the stock of merchandise on hand at the time of the giving of the promissory note and chattel mortgage on the 29th day of June, 1915, were disregarded, broken, and violated; and that said Russell at divers and sundry times between the 29th day of June, 1915, and the 21st day of February, 1916, purchased goods, wares and merchandise in large quantities and in an amount exceeding the sum of Two Thousand Dollars (\$2,000) on credit and

did not pay cash therefor, or at all, and did not pay any sum or sums of money for said goods, wares and merchandise; and that said goods, wares and merchandise so bought on credit between the 29th day of June, 1915, and the 21st day of February, 1916, were received and taken into the warehouse and lumber yards of said W. N. Russell at Big Timber, Montana, and the same were used, and a part thereof sold in the ordinary course of business of said W. N. Russell between the 29th day of June, 1915, and the 21st day of February, 1916, and a portion thereof were in the Lumber yards and warehouse of said W. N. Russell, at Big Timber, Montana, on the 21st day of February, 1916; and that at the time of the adjudication herein, the goods, wares and merchandise so on hand unsold were taken possession of by the trustee herein; and that said purchases of goods, wares and merchandise on credit were made on credit by and with the knowledge, consent and understanding of the Scandinavian American Bank, its officers, agents, servants and employees.

Eleventh. That said referee erred in his seventeenth finding of fact in that there is no evidence to show that [39] the said John G. Ellingson, by virtue of his appointment as trustee herein, is entitled to the possession of the personal property described in the chattel mortgage dated June 29th, 1915, or of the proceeds thereof.

Twelfth. That said referee erred in his eighteenth finding of fact in that there is no evidence to show that all or any of the allegations contained in

the objections filed herein against the claim of the Scandinavian American Bank are true.

Thirteenth. That said referee erred in his first conclusion of law in that by reason of the facts and the law the chattel mortgage dated June 29th, 1915, and given by the said W. N. Russell to the Scandinavian American Bank is valid and of full force and effect as against the trustee herein and the creditors of the said W. N. Russell, bankrupt.

Fourteenth. That said referee erred in his third conclusion of law in that by reason of the facts and the law the claim of the Scandinavian American Bank should be allowed in the sum of Four Thousand Four Hundred and Fifteen and No/100th Dollars (\$4,415.00) as a preferred priority and secured claim by virtue of the chattel mortgage dated June 29th, 1915, and given by the said W. N. Russell to the aforesaid Scandinavian American Bank; and that by reason of the facts and the law the said Scandinavian American Bank should not be compelled to share pro rata with the other creditors of the said bankrupt in the assets of the estate of the said W. N. Russell, doing business under the name of W. N. Russell Lumber Co., and W. N. Russell as an individual, in the sum of One Thousand and Ninety-five and 95/100 Dollars (\$1,095.95).

WHEREFORE the Scandinavian American Bank of Big Timber prays that it may be decreed by the court to have its [40] claim against the said bankrupt estate allowed for the full amount thereof as a preferred priority and secured claim, and that it be restored to all things lost by reason of

the finding and order of the referee in said matter.

And your petitioner ever prays, etc.

THE SCANDINAVIAN BANK OF BIG
TIMBER.

By JAY LOVING,
Cashier.

CHAS. W. CAMPBELL,
MILLER & O'CONNOR,
Attorneys for the Petitioner.

United States of America,
District of Montana,
County of Sweetgrass,—ss.

I, Jay Loving, an officer of the Scandinavian American Bank of Big Timber, the petitioner herein, to wit: Its cashier, do hereby make a solemn oath that the statements in the foregoing petition are true according to the best of my knowledge, information and belief.

JAY LOVING,

Subscribed and sworn to before me this twenty-seventh day of December, 1916.

[Seal] CHARLES W. CAMPBELL,
Notary Public for the State of Montana, Residing at
Big Timber, Mont. My commission expires
May 31, 1918. [41]

United States District Court, Montana.

W. N. RUSSELL,
Bankrupt.

Opinion of Bourquin, J.

The referee found that the chattel mortgage involved is invalid, because when entered into the par-

ties intended that in vital provisions it would be disregarded and it was. In the main the court perceives no reason to dissent, and so the referee's order is affirmed.

The mortgage on a stock in trade provided that the mortgagees could sell in usual course for cash or credit not exceeding 30 days, that he would keep accurate accounts of sales, that he could deduct from proceeds his living expenses, business, current expenses, and to replenish stock, deposit the net daily with and to the credit of the mortgagee bank for application to the discharge of the mortgage debt, and monthly account to the mortgagee for all sales and collections of the previous month, paying the net to the bank to apply to payment of the debt.

The mortgagee's cashier testified that the mortgagor had borrowed from the bank from time to time, that the bank "had quite a number of notes in the pouch * * * * past due, and knowing" his condition that he was owing quite a bit besides what he owed us," the bank procured the mortgage, "and told him, * * * * we would like to see him make out and we would be willing to carry him as long as he kept his stock up in shape and his business was done and that it was perfectly agreeable to us that he pay off the other creditors, as long as he did not run his stock down and took care of his business."

The mortgagor testified that on execution of the mortgage, he asked the mortgagee's cashier, who therein was acting for the bank, if he should keep a record and daily account of what I was [42]

doing and they said that would not be necessary, and I then asked them if I should come in the first of the month with statement of what I was doing "and they said no, that they would call for a statement when they wanted it."

The mortgagee deposited his receipts with the bank but in his own name, none of them were applied to the payment of the mortgagee debt. He checked them out as he pleased, in part to pay creditors prior to the mortgage and others not creditors of the business, he created new debts at the bank by overdraft and his deposits of business receipts were appropriated to their payment, he kept no accounts save sale slips, and rendered no monthly account to the bank.

The significance of all this is sought to be evaded by the mortgagee but unavailingly. The cashier attempts to modify his testimony, but it was apparent to the referee it was but an effort to relieve from the effect of his admissions on oath.

That at some indefinite time this mortgagor also deposited other money with his receipts from the mortgaged stock, cannot affect the situation.

The facts stand out that the parties intended the mortgage to protect them from interference by other creditors, to shield payments to such creditors as the mortgagee preferred and to keep by additions the stock for the protection of the mortgagee. All this operating to hinder and delay creditors after a fashion the law condemns as fraudulent, the mortgage is invalid.

This intent suffices to this conclusion. It tends to

defraud, and so the law stamps the mortgage as contrary to public policy, illegal and invalid, without inquiry whether or not fraud actually was committed.

But here, the intent was executed, and what *was* done serves to corroborate evidence of what was *intended* to be done. [43]

The evil may be illustrated thus:

The debtor owes as much or more than his business is worth.

He gives a mortgage to one creditor by the terms of which sales can be made from the proceeds of which the business is to be conducted and the net to be applied on the mortgage debt. To appease other prior creditors, the parties to the mortgage agree that so long as the stock is kept replenished the mortgagee may violate the terms of the mortgage and divert the net to pay prior creditors. He done so. The result may be that whereas if prior creditors had not been so appeased, they might have proceeded in bankruptcy and the mortgagee and they have received but a small percentage of their claims, by the method adopted the prior creditors could be paid in full, after four months the mortgage would be *prima facie* valid, and proof against attack in subsequent bankruptcy, the stock kept up by new purchases on credit pays the mortgagee in full, and the new creditors are defrauded. Defrauded in that they had a right to assume the mortgage terms were to be carried out, the net applied to extinguish the mortgage. That in due time it would be so extinguished and the stock available to pay their claims against the mort-

gagor, the law of this State will not permit.

See *Noyes vs. Ross*, 23 Montana, 425.

Nothing else seems to require notice, further than to say that failure for months to render the stipulated monthly accounts and failure to apply any of the proceeds to the mortgage debt would likewise invalidate the mortgage. Casual inquiries by the cashier of the bankrupt whether there was anything to report, how he was getting along, etc., is not a monthly account and does not serve the purposes of such a monthly account.

The deposits in seven months are over \$8,500. On occasion as much as \$400 were on deposit in the bank, to the mortgagor's credit.

The referee was not satisfied, none of this could be applied to this mortgage debt. And as in all else, his findings thereon having [44] support in the evidence and not palpably contrary to the weight of the evidence, are not to be disturbed. This order is affirmed.

BOURQUIN J. [45]

Service admitted and a copy acknowledged June 26th, 1917.

FRANK ARNOLD,
Attorney for Trustee. [46]

[Endorsed]: No. 3016. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of W. N. Russell, Bankrupt, The Scandinavian American Bank of Big Timber, Montana, a Corporation, Petitioner, vs. John G. Ellingson, Trustee for the Bankrupt, W. N. Russell, Doing

Business Under the Name of W. N. Russell Lumber Company, and W. N. Russell as an Individual, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a certain order of the United States District Court for the District of Montana.

Filed July 3, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.